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# Access to Sunlight in Ohio: The Dismal Outlook

Amy E. Blenkhorn

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# NOTES

## ACCESS TO SUNLIGHT IN OHIO: THE DISMAL OUTLOOK

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### I. INTRODUCTION

About one-fifth of all energy used around the world now comes from solar resources: wind power, water power, biomass, and direct sunlight. By the year 2000, such renewable energy sources could provide 40 percent of the global energy budget; by 2025, humanity could obtain 75 percent of its energy from solar resources. Such a transition would not be cheap or easy, but its benefits would far outweigh the costs and difficulties. The proposed timetable would require an unprecedented worldwide commitment of resources and talent, but the consequences of failure are simply unprecedented. Every essential feature of the proposed solar transition has already proven technically viable; if the 50-year timetable is not met, the roadblocks will have been political—not technical.<sup>1</sup>

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<sup>1</sup> *Alternative Long Range Energy Strategies, 1976: Hearings Before the Select Comm. on Small Business and the Comm. on Interior and Insular Affairs, 94th Cong., 2nd Sess. 73 (1976) (statement of Dennis Hayes).*

Access to sunlight or the ability to capture the sun's rays, whether such access is used for the purpose of lighting a room in a home or for use in heating or cooling a home, is not a new concept. Since ancient times people have legislated access to sunlight.<sup>2</sup> However, it is an issue which has renewed importance today, as emphasis is placed on the utilization of renewable energy sources and technology has created the means to capture the sun's seemingly unlimited supply of energy.<sup>3</sup> Yet, despite the importance of access to sunlight, new laws in this area are often deficient through their failure to give adequate legal protection to those wishing to utilize the sun's rays.<sup>4</sup>

This Note will trace the evolution of access-to-sunlight issues and the enactment of new laws in the solar-access area, with primary focus on Ohio's treatment of the issues. A brief historical review will be included as well as data relating to the feasibility of using solar energy in Ohio.<sup>5</sup> A critical analysis of the recent Ohio Solar Easement Statute also will be presented.<sup>6</sup> Solar statutes and case law of other states and policies of the federal government and foreign governments will be scrutinized. These findings will be examined in an attempt to forecast whether Ohio should adopt or reject various provisions and/or applications of law to supplement and change its legislation.

Discussion of solar access will focus on the legal issues involved when one individual attempts to utilize the sun via a solar energy system.<sup>7</sup> As defined in the Ohio Revised Code, a solar energy system "means any method used directly to provide space heating or cooling, hot water, industrial process heat, or mechanical or electrical power by the collection, conversion, or storage of solar . . . energy including but not limited to, active or passive solar systems."<sup>8</sup> Extensive discussion of scientific

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<sup>2</sup> Borimir & Perlin, *Solar Energy Use and Litigation in Ancient Times*, 1 SOLAR L. REP. 583 (1979). The Romans had a system of legally enforceable solar access rights which are contained in the DIGEST OF JUSTINIAN. *Id.* at 592-93.

<sup>3</sup> Löf, *Solar Energy: An Infinite Source of Clean Energy*, 410 ANNALS 52 (1973).

<sup>4</sup> Comment, *The Dawning of Solar Law*, 29 BAYLOR L. REV. 1013, 1023 (1977).

<sup>5</sup> See appendix *infra*.

<sup>6</sup> OHIO REV. CODE ANN. § 5301.63 (Page 1981).

<sup>7</sup> This historical analysis, however, will include discussion of access for lighting purposes.

<sup>8</sup> OHIO REV. CODE ANN. § 1551.20(A) (Page Supp. 1982). This definition does not include roofs, windows, or walls.

An active solar system is one which "collect[s] the sun's heat outside the living or working space and deliver[s] it inside, using relatively conventional pumps and fans." J. MINAN & W.H. LAWRENCE, *LEGAL ASPECTS OF SOLAR ENERGY* 3 (1981). In a passive system, "the space to be heated is so designed and oriented to the sun that it maintains stable comfortable temperatures on its own." *Id.*

Ohio defines active and passive systems as well as photovoltaic systems (systems which convert solar energy directly to electrical energy) in OHIO ADMIN. CODE §§ 1551:3-1-02 to 3-1-04 (1982).

problems in the collection of such energy is beyond the scope of this Note.<sup>9</sup>

## II. HISTORICAL EVOLUTION OF ACCESS TO SUNLIGHT

### A. *Access to Sunlight in America: An Overview*

The English common law was incorporated as part of American law at an early date.<sup>10</sup> However, the English common-law doctrine of ancient lights was not generally adopted in this country.<sup>11</sup> This doctrine entitles persons to acquire by use and occupation for a period of years a right to the unobstructed use of light and air through the windows of their houses, even though such windows are located next to the premises of an adjoining landowner.<sup>12</sup> Instead, American courts tended to look for agreements, express or implied, on the part of the landowners which would grant the right to sunlight.<sup>13</sup> These agreements generally took the form of

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<sup>9</sup> For more information on the scientific and technical aspects of collecting the sun's rays, see J. DUFFIE & W. BECKMAN, *SOLAR ENGINEERING OF THERMAL PROCESSES* (1980); W. METZ & A. HAMMOND, *THE SCIENCE REPORT ON SOLAR ENERGY IN AMERICA* (1978).

<sup>10</sup> This statement may not be completely accurate. Justice Story, in *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137 (1829), stated: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright, but they brought with them and adopted only that portion which was applicable to their situation." *Id.* at 144.

<sup>11</sup> Although a scattering of early cases in some states accepted the doctrine, *Clawson v. Primrose*, 4 Del. Ch. 643 (1873); *Robinson v. Pittenger*, 2 N.J. Eq. 57 (Ch. 1838); *Story v. Odin*, 12 Mass. 157, 7 Am. Dec. 46 (1815), most states followed the leading case of *Parker v. Foote*, 19 Wend. 309 (N.Y. Sup. Ct. 1838), which rejected the doctrine. The *Parker* court stated: "[I]t cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences." *Id.* at 318. Today almost every state has repudiated the doctrine. See Gergacz, *Solar Energy Law: Easements of Access to Sunlight*, 10 N.M.L. REV. 121, 140 n.63 (1979). Louisiana seems to be an exception. See Moskowitz, *Legal Access to Light: The Solar Energy Imperative*, 9 NAT. RESOURCES LAW. 177, 189 n.59 (1976).

<sup>12</sup> One of the first reported English cases to enunciate the doctrine was *William Aldred's Case*, 77 Eng. Rep. 816 (K.B. 1610). Amazingly, it still finds currency in England today. In 1832 the Prescription Act codified the doctrine. Prescription Act, 1832, 2 & 3 Will. 4, ch. 71, § 3. In 1959 the Rights of Light Act was passed, which implemented minor change in the 1832 act. Rights of Light Act, 1959, 7 & 8 Eliz. 2, ch. 56, §§ 1-8.

For a general discussion of the Rights of Light Act, see Greene, *Easements of Light*, 126 NEW L.J. 143 (Feb. 5, 1976).

For more background information on ancient lights, see S. KRAEMER, *SOLAR LAW: PRESENT AND FUTURE* 130-32 (1978); Seeley, *Comparative Aspects Of Access To Sunlight: The United States, Great Britain and Japan*, 21 HARV. INT'L L.J. 687, 690-700 (1980).

<sup>13</sup> Some state courts would recognize only express agreements, on the theory that implied easements would unduly burden real property. See, e.g., *Baird v. Hanna*, 328 Ill. 436, 159 N.E. 793 (1928); *Morrison v. Marquardt*, 24 Iowa 35 (1868); *Mullen v. Stricker*, 19 Ohio St. 135 (1869); *Haverstick v. Sipe*, 33 Pa. 368 (1859).

Other courts were willing to imply easements based on necessity. See, e.g., *Robinson v. Clapp*, 65 Conn. 365, 32 A. 939 (1895); *Case v. Minot*, 158 Mass. 577, 33 N.E. 700 (1893); *Stutphen v. Therkelson*, 38 N.J. Eq. 318 (Ch. 1884); *Powell v. Sims*, 5 W. Va. 1 (1871).

easements or restrictive covenants.<sup>14</sup> An easement may be defined as a right of use over the property of another.<sup>15</sup> Access to sunlight is a negative easement, since the owner of the servient estate agrees *not* to perform any action concerning his or her land which would otherwise be lawful but would be to the detriment of the dominant estate.<sup>16</sup> In the solar-access situation the solar user owns the dominant estate, which is benefited. The grantor of the easement, who agrees not to block access, owns the servient estate. A restrictive covenant is similar to an easement, being a provision in a deed which limits the use of property.<sup>17</sup> In either case the effect of such recognition is the same—a right to access to sunlight.

Early actions for access to sunlight were based on different considerations than would attend such an action today. In earlier cases access to light was desired to ensure adequate room lighting—a form of indirect sunlight—while direct sunlight is needed for utilization of the sun's rays for today's solar heating and cooling.<sup>18</sup> Thus, while much of the case law of the late nineteenth and early twentieth century is still valid precedent, it is questionable whether application of that law to easements in light is appropriate in the solar-energy-access area. In addition, many early actions were concerned with air and view rights in conjunction with light rights.<sup>19</sup> It is perhaps these considerations coupled with energy concerns that have led many states and the federal government to enact legislation dealing with access to sunlight or the utilization of solar energy.<sup>20</sup>

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<sup>14</sup> Easements and restrictive covenants, because contractual in nature, are a good means of regulating private land-use.

<sup>15</sup> *Mahnken v. Gillespie*, 329 Mo. 38, 42, 43 S.W.2d 797, 801 (1931).

<sup>16</sup> *Gergacz*, *supra* note 11, at 128.

<sup>17</sup> *Springer v. Gaddy*, 172 Va. 533, 535, 2 S.W.2d 355, 358 (1939).

<sup>18</sup> *Myers, The Common Law of Solar Access: An Insufficient Protection for Users of Solar Energy*, 6 REAL EST. L.J. 320, 327 (1978).

<sup>19</sup> See Annot., 142 A.L.R. 3d 467 (1943), for cases which deal with express easements of light, air, and view.

<sup>20</sup> Almost every state has enacted some form of solar-access statute or become involved in supplying information on solar energy use. See Note, *Securing Access in Maine*, 32 MAINE L. REV. 439, 442 n.16 (1980), for a listing.

In addition, right-to-light proposals have been introduced in Congress. In 1976 Congressman Moakley of Massachusetts introduced the following:

§ 2. No State or local zoning law, regulation, ordinance, or other provision may permit the construction of any building or other object within the jurisdiction of such State or locality in any location or manner which would obstruct or otherwise interfere with sunlight necessary for the operation of any solar heating equipment, solar cooling equipment, or combined solar heating and cooling equipment which is in use on any building on the date on which any permit or other authorization for such construction is issued (or on the date of such construction in any case in which no such permit or other authorization for such construction is required under the applicable law, regulation, ordinance, or other provision).

H.R. 11677, 94th Cong., 2nd Sess. § 2 (1976).

The federal government has enacted legislation to encourage solar use. See Solar Energy and Energy Conservation Bank Act of 1980, Pub. L. No. 96-294, 94 Stat. 719; Solar Photo-

### B. History in Ohio

The ability to obtain a legal right to solar access in Ohio has changed very little over the past one hundred years. As early as 1860 the Ohio Supreme Court rejected the doctrine of ancient lights.<sup>21</sup> A few years later the court in *Mullen v. Stricker*<sup>22</sup> stated clearly what continues to be the law in Ohio: "[N]o prescriptive right to the use of light and air through windows can be acquired by any length of use or enjoyment."<sup>23</sup> The court further rejected implied easements of light and air:

What we hold is, that the law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another in any case. . . . It seems to us that this doctrine of easements in light and air, founded upon sheer necessity and convenience, like the doctrine of "ancient windows," or prescriptive right to light and air by long user, is wholly unsuited to our condition, and is not in accordance with the common understanding of the community. . . . They are unsuited to a country like ours, where real estate is constantly and rapidly appreciating, and being subjected to new and more costly forms of improvement, and where it so frequently changes owners as to become a matter of merchandise. . . .

[The doctrine] would, moreover, in many cases, be a perpetual incumbrance upon the servient estate, and operate as a veto upon improvements in our towns and cities. It will be safer, we think, and more likely to subserve the ends of justice and public good, to leave the parties, on the question of light and air, to the boundary lines they name, and the terms they express in their deeds and contracts.<sup>24</sup>

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voltaic Energy Research, Development, and Demonstration Act of 1978, Pub. L. No. 95-590, 92 Stat. 2513; Solar Energy Research Development and Demonstration Act of 1974, Pub. L. No. 93-473, 88 Stat. 1431; and Solar Heating and Cooling Demonstration Act of 1974, Pub. L. No. 93-409, 88 Stat. 1069.

<sup>21</sup> *Hieatt v. Morris*, 10 Ohio St. 523, 78 Am. Dec. 280 (1860). Interestingly, this was not a right-to-light case but rather an action for damages sustained when defendant grantee took down half a party wall and plaintiff grantee's wall fell in. The plaintiff grantee alleged that his predecessor and defendant grantee's predecessor had agreed to build a partition wall for support of their houses and that by virtue of the continued occupation by the grantee for more than 21 years he had acquired title by prescription. The court, in denying plaintiff relief, rejected the claim of prescription based on the refusal of other jurisdictions to recognize the doctrine of ancient lights. *Id.* at 530.

<sup>22</sup> 19 Ohio St. 135 (1869). The court denied an injunction sought by one landowner in order to stop his adjoining neighbor from building a structure which would block his light and air. Both lots had been conveyed to the neighbors at the same time.

<sup>23</sup> *Id.* at 142.

<sup>24</sup> *Id.* at 143-44.

The *Mullen* court's rejection of the prescriptive easement was followed in *Haimeyer v. Tietig*,<sup>25</sup> which was decided by the Superior Court of Cincinnati in 1885. In that case an adjoining landowner unsuccessfully sought to enjoin the construction of a neighboring building which would have blocked light and air from his cellar windows. Likewise, the *Mullen* decision was utilized to give effect to the agreement between parties in *Haas v. Straus*.<sup>26</sup> The court enjoined one neighbor from building a porch of a different type from those theretofore built, which would have seriously obstructed a neighbor's easement of light and view and which was in violation of a building restriction.

*Stutzman v. Ach*,<sup>27</sup> decided sometime between 1865 and 1873 by the Montgomery County Superior Court, defined an express agreement more expansively than either *Mullen* or *Haas*.<sup>28</sup> The court found that the unobstructed use of light and air might be acquired by grant, deed, or parole license.<sup>29</sup> The court held:

A mere verbal contract granting such right could not be enforced, but where such verbal permission had been given by one party and acted upon by the other, who had in good faith, under such license, constructed such windows, he thereby acquired a perfect right to their free and unobstructed use and enjoyment.<sup>30</sup>

This slight variation is interesting in that it signals greater judicial receptivity to recognizing a guarantee of access to light and air. The right to access has never since been characterized as broadly as in *Stutzman* in either Ohio case law or legislative enactments.<sup>31</sup>

Spite-fence cases represent another category of litigation which often deals with blocking light and air.<sup>32</sup> One of the first spite-fence cases was *Peck v. Bowman*,<sup>33</sup> which was decided by the Cuyahoga Court of Common Pleas. The court held that a motive of malice alone in shutting off the view of another was a nuisance.<sup>34</sup> The court relied heavily on a Michigan

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<sup>25</sup> 9 Ohio Dec. Reprint 438 (Super. Ct. Cincinnati 1885).

<sup>26</sup> 34 Ohio Cir. Dec. 377, 23 Ohio C.C. (n.s.) 547 (8th Dist. 1912) (Cuyahoga County).

<sup>27</sup> 1 Dayton 395 (Super. Ct. Montgomery, no date available). This case does not appear in any other reporter and has not been cited in any other cases.

<sup>28</sup> *Mullen* had referred to terms in "deeds and contracts," 19 Ohio St. at 144, while *Haas* enforced a covenant in a deed, 34 Ohio Cir. Dec. at 377, 23 Ohio C.C. (n.s.) at 547.

<sup>29</sup> 1 Dayton at 396.

<sup>30</sup> *Id.*

<sup>31</sup> In enacting the Ohio Solar Access Easement Act in 1979 the Ohio legislature seems to have adopted the view expressed in *Mullen*, since solar easements must be in writing to be enforceable. Case law directly on point is scarce and no other expansive definition of express agreement could be found in other access cases.

<sup>32</sup> Spite fences derive their name from the purpose for which they were erected—for spite. For a historical perspective on these cases, see O'Meara & Santen, *Legal Status of the Spite Fence in Ohio*, 2 U. CIN. L. REV. 164 (1928).

<sup>33</sup> 10 Ohio Dec. Reprint 567 (C.P. Cuyahoga County 1889).

<sup>34</sup> *Id.* at 570.

case<sup>35</sup> which had found a nuisance existed when malice was the motive for shutting out light. The *Peck* court reasoned: "I do not know of anything that, in its nature, would be more of a nuisance, than to have a structure of this sort, that can be seen the whole length of the street, that is no ornament, and in no sense useful."<sup>36</sup>

*Dawson v. Kemper*,<sup>37</sup> decided five years after *Peck*, found contrary to that decision. It held that since there was no right to light and air, motive was immaterial to any injury the plaintiff may have suffered when his neighbor erected a fence shutting out his light and view. The plaintiff suffered no legal injury.<sup>38</sup>

The leading case on spite fences in Ohio is *Letts v. Kessler*,<sup>39</sup> which was decided in 1896. One adjoining landowner brought an action against the other to compel removal of a fence which shut out his light and air. The fence was built for no useful or ornamental purpose, but from motives of malice. The court found that the person erecting the fence had a legal right to do so and it would not compel removal. The court stated:

Where *no right* has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong. . . .

. . . [T]here may be injuries to the property of another for which there is no remedy, as in draining a spring or well, or cutting off light and air or a pleasant view by the erection of buildings . . . .<sup>40</sup>

Just as in the *Mullen* line of cases, the court in *Letts* refused to recognize a legal right to light and air in the absence of an express agreement. If the court had concluded that a right to light existed, an action in nuisance might have been successful so as to grant relief to the plaintiff.<sup>41</sup>

There is one other line of cases dealing with access to light and air which bears mentioning, since it recognizes an implied right to light and air. The cases in this line may be categorized as "street cases"; they deal with the access rights of an abutting property owner to light and air in

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<sup>35</sup> *Burke v. Smith*, 69 Mich. 380, 37 N.W. 838 (1888). Two neighbors quarreled, after which the defendant put up a screen in front of the lower side windows of plaintiff's house, shutting off the light.

<sup>36</sup> 10 Ohio Dec. Reprint at 570.

<sup>37</sup> 1 Ohio Dec. 556, *petition dismissed*, 5 Ohio Cir. Dec. 130 (1895) (Hamilton County).

<sup>38</sup> *Id.* at 558.

<sup>39</sup> 54 Ohio St. 73, 42 N.E. 765 (1896).

<sup>40</sup> *Id.* at 85, 42 N.E. at 767 (quoting *Boynton, J.*, in *Railroad Co. v. Bingham*, 29 Ohio St. 364, 369 (1876)) (emphasis added).

<sup>41</sup> A successful nuisance action requires interference with a legal right. However, this court still might not have been persuaded by a legal-right argument, since it distinguished nuisances such as smoke, gas, smells or noises, in which something is produced on one's own premises and conveyed to the premises of another, and light and air where something is simply withheld. *Id.* at 82, 42 N.E. at 766-67.



the street. One of the earliest Ohio cases to discuss this issue, and perhaps the most controversial, was *Cohen v. City of Cleveland*.<sup>42</sup> Cohen, an owner of property abutting a street, claimed he was entitled to damages after the city of Cleveland constructed a lawful viaduct in front of his home. The court held that Cohen was entitled to damages upon proof that the viaduct diverted travel on that part of the street, impaired Cohen's access to light and air, caused noise and the jarring of his house night and day, and decreased the value of his property.<sup>43</sup>

This holding seems in direct conflict with *Letts* and *Mullen*, since no express agreement appeared to exist between Cohen and the city which would allow enforcement of an easement in light and air. In addition, the viaduct was held not to be a nuisance, unlike the building of the fence in *Peck*. The authority for the decision seemed to rest on a line of cases which afforded the recovery of damages against municipal corporations for injuries resulting from the change of established grades in the street.<sup>44</sup> Regardless of the reason, however, it would appear from this case and other Ohio case law that easements of light and air were recognized for owners of property abutting a street.<sup>45</sup> However, not all courts have followed the reasoning of *Cohen*. Those courts using *Mullen* as authority for finding that easements of light or air shall not be implied have decided directly opposite to *Cohen*.<sup>46</sup>

The history of these inconsistent "street cases" is an indication of the confusion in the light-and-air access area. As late as 1960 the Ohio Supreme Court was still struggling over the rights of owners of street-abutting property in *State ex rel. Schiederer v. Preston*.<sup>47</sup> The plaintiff in this case complained that raising the grade of a street in front of her land interfered substantially with her right to an unobstructed view of the street. The court held:

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<sup>42</sup> 43 Ohio St. 190, 1 N.E. 589 (1885).

<sup>43</sup> *Id.* at 193, 1 N.E. at 590-91.

<sup>44</sup> See, e.g., *Keating v. Cincinnati*, 38 Ohio St. 141 (1882); *Street Ry. v. Cumminsville*, 14 Ohio St. 523 (1863); *Crawford v. Delaware*, 7 Ohio St. 460 (1857).

<sup>45</sup> See *Lloyd Booth Co. v. Mahoning Co.*, 12 Ohio Cir. Dec. 706 (1898) (Mahoning County), in which the court allowed an injunction to issue (as opposed to the damages award in *Cohen*) halting the building of a viaduct which would have impaired plaintiff's access to light and air. See also, e.g., *Ohio Postal Telegraph-Cable Co. v. Smith*, 128 Ohio St. 400, 191 N.E. 698 (1934) (owner of property which adjoins either a country highway or city street is entitled to damages for interference with his access, light, or air); *Village of Port Clinton v. Fall*, 99 Ohio St. 153, 124 N.E. 189 (1919) (the right to light, air, and view over a street was found to be an incorporeal hereditament); *Occo Realty Co. v. N.Y. Chicago & St. Louis Ry. Co.*, 33 Ohio App. 414, 169 N.E. 719 (1929) (abutting owner's rights to access, light, and air are property rights); *City of Cincinnati v. Diamond Light Co.*, 4 Ohio App. 177 (1915) (owner of abutting property has certain right to the use of the land in a public street for access, light, and air).

<sup>46</sup> See *Offutt v. John Roth Packing Co.*, 11 Ohio C.C. (n.s.) 357 (1908) (Hamilton County).

<sup>47</sup> 170 Ohio St. 542, 166 N.E.2d 748 (1960).

[T]here is no taking of property merely because the raising of the grade of part of a street in front of land on that street, in making an improvement for street or highway purposes only, substantially interferes with the view that the owner of the land had over the street . . . .<sup>48</sup>

The court took pains to distinguish *Cohen* on the ground that the light- and air-impairment claim in that case was conjoined with allegations of noise, jarring, and traffic diversion, implying that damages would not have been awarded for impairment of air and light alone.<sup>49</sup> The court cited *Mullen* for the proposition that no easements of light and air would be implied in Ohio.<sup>50</sup>

One other area of Ohio case law concerning access to sunlight warrants brief mention. In cases in which a lessee brings an action against the lessor for blocking access to light and air, the court may be more willing to protect the lessee's access on the basis of a written lease agreement.<sup>51</sup>

In sum, the history of solar access rights in Ohio has generally been that no easement of light would be recognized unless express in a contract or a deed.<sup>52</sup> While exceptions to this general rule seem to exist, the authority of these cases is doubtful. It should be noted that all of the Ohio cases considering this issue have dealt with access to sunlight for lighting a dwelling house. Yet the law dealing with lighting a home seems to have been adopted wholeheartedly in Ohio in the new area of access to sunlight for the production of energy, as evidenced by the recent enactment of the Ohio solar easement statute.<sup>53</sup> The remainder of this Note will examine this Act and discuss why such a total incorporation of old law is inappropriate.

### III. THE OHIO SOLAR ACCESS EASEMENT ACT & RELATED PROVISIONS

#### A. An Overview

The Ohio Solar Access Easement statute was enacted in August 1979.<sup>54</sup> The statute does little to alter the rights that solar users had prior to its

<sup>48</sup> *Id.* at 548, 166 N.E.2d at 753.

<sup>49</sup> *Id.* at 547, 166 N.E.2d at 752.

<sup>50</sup> *Id.* at 546, 166 N.E.2d at 751.

<sup>51</sup> See *Weiss-Pollack Co. v. Gibson Art Co.*, 27 Ohio N.P. (n.s.) 354 (C.P. Hamilton County 1929) (injunction granted barring the lessor from erecting a building in an area which would have destroyed lessee's access to light and air). See also *Hilliard v. N.Y. & Cleveland Gas Coal Co.*, 41 Ohio St. 662 (1885) (easement in light cannot be implied when the adjoining property does not belong to lessor, but if the lease provides for the enjoyment of the light and air the lessor is answerable in case of an obstruction).

<sup>52</sup> *Mullen v. Stricker*, 19 Ohio St. 135, 144 (1869).

<sup>53</sup> OHIO REV. CODE ANN. § 5301.63 (Page 1981). This statute supports the making of express agreements in order to obtain access to sunlight.

<sup>54</sup> *Id.*

passage; it provides simply that for the purpose of ensuring adequate access to sunlight for solar energy collection devices any person may grant a written solar access easement to another. As noted above, this right has been long-available at common law.<sup>55</sup> The statute does, however, establish guidelines for the content of such easements:<sup>56</sup>

Any instrument that grants a solar access easement shall include:

(A) A description of the real property burdened and benefited by the solar access easement;

(B) A description of the limits in heights, locations, or both of permissible development on the burdened land in terms of structures, vegetation, or both, for the purpose of providing solar access for the benefited land;

(C) Any terms or conditions under which the solar access easement is granted or may be terminated;

(D) A term stating that the solar access agreement runs with the land, unless terminated in accordance with the terms of the easement regarding termination, or unless otherwise agreed by the parties;

(E) Any other provisions necessary or desirable to execute the instrument.<sup>57</sup>

In addition, this section of the statute entitles the owner of the benefited land (the solar user) to prevent the obstruction of the solar easement by maintaining an action for damages in equity or at law.<sup>58</sup>

The Ohio Act is not a grant of a right to light,<sup>59</sup> but merely facilitates written solar access easements through the establishment of governing conventions. However, other provisions of the Ohio Revised Code, also enacted in 1979, appear to increase the benefits of becoming a solar user.<sup>60</sup>

One provision exempts from real property taxation<sup>61</sup> any solar energy system constructed or installed prior to December 31, 1985 which complies with the administrative guidelines adopted by the director of en-

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<sup>55</sup> *Mullen v. Stricker*, 19 Ohio St. 135 (1869).

<sup>56</sup> It should be noted that this section does not affect the status of easements conveyed prior to the effective date of the statute which do not conform to these guidelines.

<sup>57</sup> OHIO REV. CODE ANN. § 5301.63 (Page 1981).

<sup>58</sup> *Id.*

<sup>59</sup> Compare the Ohio Act, OHIO REV. CODE ANN. § 5301.63 (Page 1981), with the New Mexico Act, N.M. STAT. ANN. §§ 47-3-1 to 3-5 (1978) (granting a right to light as opposed to facilitating access).

<sup>60</sup> Note, *H.B. 154: Ohio Creates Renewable Energy Resource Tax Incentives and Solar Access Easements*, 5 U. DAYTON L. REV. 471 (1980).

<sup>61</sup> OHIO REV. CODE ANN. § 1551.20(B)-(C) (Page Supp. 1982) is the provision which delegates to the Director of Energy the task of determining eligibility of solar energy systems for tax exemptions.

ergy.<sup>62</sup> A similar code section, also available until December 31, 1985, grants a sales and use tax exemption for materials sold to a construction contractor. Materials must meet the eligibility guidelines for solar systems or components.<sup>63</sup> A companion section exempts installation costs of acceptable systems.<sup>64</sup>

In yet another tax section, a ten percent credit to a maximum of \$1,000 is allowed for costs incurred prior to December 31, 1985 for the purchase and installation of a solar system.<sup>65</sup> Under this section, the credit must be taken in the year subsequent to the installation and operation of the system and may be taken only once.<sup>66</sup> A related section allows similar tax credits to corporations who purchase and install eligible energy systems in corporate facilities.<sup>67</sup>

Finally, one part of the Ohio Revised Code prohibits gas and natural gas companies (prior to January 1, 1986) from refusing to extend service to an eligible residential consumer whose residence is equipped with a solar energy heating system.<sup>68</sup> An analogous section prohibits electric light, gas and natural gas companies, and the Public Utilities Commission from discriminating in regard to schedules and curtailment orders against residences that utilize eligible energy systems.<sup>69</sup>

The tax credit provisions of the Code supplement the solar access statute to the extent of offering incentives for the use of alternative energy sources.<sup>70</sup> They do not, however, correct the deficiencies in the Act with respect to access to sunlight.<sup>71</sup>

### *B. Developments in Ohio Since Passage of the Solar Access Easement Act*

During the four-and-a-half years since the advent of the Ohio Solar Access Easement Act very little has been done to encourage the use of solar energy easements in Ohio,<sup>72</sup> although the use of solar energy in the state

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<sup>62</sup> OHIO REV. CODE ANN. § 5709.53 (Page 1980). Because real property exemptions benefit all income classes and the costs of administration are low, they are attractive tax incentives. R. HYATT, *LEGAL AND INSTITUTIONAL IMPLICATIONS OF PROVIDING FINANCIAL INCENTIVES TO ENCOURAGE THE DEVELOPMENT OF SOLAR TECHNOLOGIES* 15 (1979).

<sup>63</sup> OHIO REV. CODE ANN. § 5739.02(B)(13) (Page 1980). Sales and use tax exemptions have the effect of reducing the initial cost of a solar system, and so may encourage its use. See R. HYATT, *supra* note 62, at 16.

<sup>64</sup> OHIO REV. CODE ANN. § 5739.02(B)(27) (Page Supp. 1982).

<sup>65</sup> OHIO REV. CODE ANN. § 5747.053 (Page 1981). A similar provision for tax credit is part of the Federal Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (1978).

<sup>66</sup> OHIO REV. CODE ANN. § 5747.053 (Page Supp. 1982).

<sup>67</sup> OHIO REV. CODE ANN. § 5733.062 (Page Supp. 1982).

<sup>68</sup> OHIO REV. CODE ANN. § 4933.31 (Page Supp. 1982).

<sup>69</sup> OHIO REV. CODE ANN. § 4933.32 (Page Supp. 1982).

<sup>70</sup> See Note, *supra* note 60, at 472.

<sup>71</sup> See *infra* text accompanying notes 82-141, which discusses these deficiencies.

<sup>72</sup> This inaction is evidenced by a letter received by this author from the Ohio Depart-

is not only possible, but entirely feasible.<sup>73</sup> The Ohio Department of Energy has failed to develop a plan or program for solar easements except to support them when needed,<sup>74</sup> although it has established guidelines for identifying solar energy systems which qualify for the Ohio tax exemptions and credits.<sup>75</sup> The guidelines cover passive, active, and photovoltaic solar systems.<sup>76</sup> Promulgated in April of 1980, the rules were subject to review and revision in 1982 but were not revised.<sup>77</sup>

The definitions of the types of energy systems are complete and complement the broader definition of solar energy system found in Ohio Revised Code section 1551.20(A).<sup>78</sup> The promulgation of these definitions is significant since a problem in much state legislation is the absence of definition of important terms.<sup>79</sup>

A potential problem, and perhaps the reason for the lack of progress since the passage of the Solar Access Easement Act, is that the authority of the Director of Energy is unclear, other than the right to establish and

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ment of Energy:

In response to your request for information on solar easements in Ohio, our legal staff recommended that we direct you to Title 53 of the Revised Code on Real property, specifically Chapter 5301 and Section 5301.63, and supplied the following comments: Ohio law officially recognizes solar easements and their conveyance within the terms of the existing law on easements contained in Chapter 5301.

The Ohio Department of Energy has rules on solar systems contained in Chapter 1551:3 of the Administrative Code although there are none contained therein on solar easements. Rule 1551:3-1-07 references to the property tax exemption contained in Section 5709.53 of the Revised Code.

*There is no plan or program for solar easements in Ohio, and the Ohio Department of Energy does not really have a policy on solar easements, except perhaps that it supports them where needed.*

Letter from Helen M. Ford to author (February 1, 1983) (in response to inquiries about solar access easements and solar energy use in Ohio) (emphasis added).

<sup>73</sup> See appendix *infra*. See also DUFFIE & BECKMAN, *supra* note 9, at 722.

<sup>74</sup> See *supra* note 72.

<sup>75</sup> OHIO ADMIN. CODE §§ 1551:3-1-02 to 3-1-10 (1980). These guidelines also include definitions of wind and hydrothermal energy systems which entitle the user to tax exemptions and credits.

<sup>76</sup> Active and passive systems are defined *supra* note 8. A photovoltaic system is defined in OHIO ADMIN. CODE § 1551:3-1-03 (1980) as

a system that converts solar energy directly to electrical energy. A photovoltaic system requires electrical transmission and storage devices. The components of a photovoltaic system include:

- (A) the photovoltaic cell, and any device(s) required to mount the cell;
- (B) electrical conduits from the photovoltaic cells to the point of use or storage; and/or
- (C) storage batteries.

<sup>77</sup> Telephone interview with Helen M. Ford, Ohio Department of Energy (January 15, 1983).

<sup>78</sup> See OHIO ADMIN. CODE §§ 1551:3-1-01 to 3-1-04 (1982).

<sup>79</sup> M. WARREN, PROBLEMS IN THE ADMINISTRATION OF STATE SOLAR LEGISLATION 7 (1979).

approve systems guidelines.<sup>80</sup> The Act and related sections do not establish a clear delegation of administrative authority. They also do not clearly set forth the limits of any such delegated authority. This restricts the effectiveness of the statute. If, under the Act, the state had delegated authority to the Department of Energy to promote the use of solar energy actively in addition to promulgating guidelines for acceptable systems, more activity certainly would have taken place over the last four-and-a-half years.<sup>81</sup>

#### IV. AN ASSESSMENT OF THE OHIO ACCESS-TO-SUNLIGHT LEGISLATION AS COMPARED WITH THAT OF OTHER STATES, THE FEDERAL GOVERNMENT AND OTHER COUNTRIES

It may be assumed that passage of Ohio's Solar Access Easement Act was a step in the direction of encouraging solar use. However, the Act does not expressly state this purpose.<sup>82</sup> In fact, the provision in the Ohio Revised Code which comes closest to encouraging solar use does not even use the words "solar energy."<sup>83</sup> This omission of a stated purpose is regrettable. Should an Ohio court be asked to resolve a dispute under the statute, it will not have the benefit of knowing the legislative purpose of the Act to aid in its interpretation.<sup>84</sup> The federal Solar Heating and Cooling Demonstration Act of 1974 includes a statement of congressional findings and policy from which the Ohio legislature could have drawn ideas.<sup>85</sup>

<sup>80</sup> The director is given this authority under OHIO REV. CODE ANN. § 1551.20 (Page Supp. 1982).

<sup>81</sup> It is surprising that more activity has not taken place, since one of the state's energy purposes is the encouragement of the development of renewable energy resources. OHIO REV. CODE ANN. § 1551.18 (Page 1978).

<sup>82</sup> See OHIO REV. CODE ANN. § 5301.63 (Page 1981).

<sup>83</sup> OHIO REV. CODE ANN. § 1551.18 (Page 1978) declares the state's energy planning purposes: "The general assembly finds and declares that it is an essential government function and public purpose of the state to promote the efficient utilization . . . of the state's indigenous energy resources, [and] promote the development of renewable energy resources. . . ." (emphasis added).

<sup>84</sup> In some states, such as California, statements of legislative intent are "virtually conclusive as to judicial interpretation." Note, *Obtaining Solar Access in California: The Solar Rights Act*, 17 CAL. W.L. REV. 123, 138 (1980).

<sup>85</sup> 42 U.S.C. § 5501 (1976). The declaration of policy includes findings:

(a) The congress hereby finds that—

- (1) the current imbalance between supply and demand for fuels and energy is likely to persist for some time;
- (2) the early demonstration of the feasibility of using solar energy for the heating and cooling of buildings could help to relieve the demand upon present fuel and energy supplies;
- (3) the technologies for solar heating are close to the point of commercial application in the United States;
- (4) the technologies for combined solar heating and cooling still require research, development, testing and demonstration, but no insoluble

The federal statute finds that "the widespread use of solar energy in place of conventional methods for heating and cooling of buildings would have a significantly beneficial effect upon the environment."<sup>86</sup> Should a court be faced with a situation where solar access was substantially impaired, this declaration gives a clear indication of legislative intent. Since there is no precedent in Ohio under its Act and no purpose stated, the Ohio courts will not be as clearly guided.<sup>87</sup> Such a purpose should be added.

Additionally, the Ohio statute does not expand at all the already-existing common-law right of two parties to create an easement. Although easements have legal advantages, they also have disadvantages. Being contractual in nature, easements can be negotiated between two parties without governmental intervention<sup>88</sup> and they offer more lasting protec-

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technical problem is now foreseen in achieving commercial use of such technologies;

(5) the early development and export of viable solar heating equipment and combined solar heating and cooling equipment, consistent with the established preeminence of the United States in the field of high technology products, can made [sic] a valuable contribution to our balance of trade;

(6) the widespread use of solar energy in place of conventional methods for the heating and cooling of buildings would have a significantly beneficial effect upon the environment;

(7) the mass production and use of solar heating and cooling equipment will help to eliminate the dependence of the United States upon foreign energy sources and promote the national defense;

(8) the widespread introduction of low-cost solar energy will be beneficial to consumers in a period of rapidly rising fuel cost;

(9) innovation and creativity in the development of solar heating and combined solar heating and cooling components and systems can be fostered through encouraging direct contact between the manufacturers of such systems and the architects, engineers, developers, contractors, and other persons interested in installing such systems in buildings;

(10) evaluation of the performance and reliability of solar heating and combined solar heating and cooling technologies can be expedited by testing under carefully controlled conditions; and

(11) commercial application of solar heating and combined solar heating and cooling technologies can be expedited by early commercial demonstration under practical conditions.

(b) It is therefore declared to be a policy of the United States and the purpose of this Act to provide for the demonstration within a three-year period of the practical use of solar heating technology, and to provide for the development and demonstration within a five-year period of the practical use of combined heating and cooling technology.

Pub. L. No. 93-409, § 2, 88 Stat. 1069, 1069 (codified at 42 U.S.C. § 5501 (1976)).

<sup>86</sup> *Id.*

<sup>87</sup> The only precedent on access to sunlight available to Ohio courts would be the early cases discussed *supra* at notes 21-52, which were decided before passage of the Solar Access Easement Act and do not take into account the use of the sun as an energy source.

<sup>88</sup> Adams, *An Analysis of Solar Legislation: Taxes and Easements*, 14 LAND & WATER

tion than zoning laws.<sup>89</sup> However, the necessity of purchasing the easement might add to the cost of a solar system,<sup>90</sup> and since an easement is real property, an owner may be further taxed.<sup>91</sup> Another shortcoming results from the fact that drafting an easement requires exacting technical knowledge.<sup>92</sup> Finally, the negotiation of an easement requires the voluntary cooperation of at least two neighbors and sometimes more.<sup>93</sup> Thus, while legislation guiding the creation of solar easements may be a start, it does not go far enough in assuring access to sunlight. The refusal of an adjoining landowner to grant an easement in sunlight would be sufficient to stop an individual from investing the money to install a solar energy collector. Hence the assumed goal of encouraging solar use could easily be defeated.

Several states have established statutory provisions which go beyond the granting of easements to ensure access to sunlight. For example, Minnesota has passed legislation which gives local governments the power to utilize zoning to ensure access to sunlight.<sup>94</sup> The power to zone comes from the police power of the state, and hence the state may delegate the authority to zone to local authorities.<sup>95</sup> The effect of the Minnesota Solar

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L. REV. 393, 415 (1979).

<sup>89</sup> *Id.*

<sup>90</sup> Comment, *Solar Rights: Guaranteeing a Place in the Sun*, 57 OR. L. REV. 94, 117 (1977).

<sup>91</sup> *Id.*

<sup>92</sup> Gergacz, *supra* note 11, at 136-37. Ohio law requires a description of the burdened and benefited real property as well as "a description of the limits in heights, locations, or both or permissible development on the burdened land in terms of structures, vegetation, or both for the purposes of providing solar access for the benefited land." OHIO REV. CODE ANN. § 5301.63(A) & (B) (Page 1981).

This requirement would probably necessitate the services of someone with specialized knowledge as to the shadows cast by vegetation and structures, in order to determine their permissible height and location. Ohio does not require the even more technological specifications some states require. *See, e.g.,* COLO. REV. STAT. § 38-32.5-101, 5-102, which requires the vertical and horizontal angles in degrees at which the solar easement extends over the property to which it is subject.

<sup>93</sup> Comment, *Access to Sunlight: New Mexico's Solar Rights Act*, 10 N.M.L. REV. 169, 169-70 (1980).

Sometimes a homeowner may have to negotiate more than one easement to ensure access because of the positioning of the sun in relation to the collector.

<sup>94</sup> MINN. STAT. ANN. 462.39 (West Supp. 1982). *See also* CAL. GOV'T CODE § 66473.1 (West Supp. 1982); CONN. GEN. STAT. ANN. § 8-2 (West Supp. 1982); OR. REV. STAT. § 407.048 (1918). Ohio Rev. Code § 711.70 (Page Supp. 1982) does direct that county or regional planning commissions adopt rules governing plot and subdivisions in their jurisdiction which take into account open spaces for light and air. However, this provision was not intended to encourage zoning for access to sunlight and has not promoted it. A more particularized statute is needed. *See infra* text accompanying note 150.

<sup>95</sup> W. THOMAS, A. MILLER & R. ROBBINS, *OVERCOMING LEGAL UNCERTAINTIES ABOUT USE OF SOLAR ENERGY SYSTEMS* 52 (1978).

The validity of zoning was upheld by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).



Zoning Act is to make solar access for energy purposes a consideration in long-range planning.<sup>96</sup> This is an important aspect of the Minnesota Act since such planning could allow for the building of homes in a manner less likely to obstruct the light of adjoining landowners.<sup>97</sup> The law also contains suggestions for residential subdivision regulations which would utilize land-use controls such as setback requirements, height restrictions, and restrictive covenants.<sup>98</sup> Such devices are often used to regulate uniformity of appearance in subdivisions and are easily adaptable to solar access needs. California also legislates covenants and conditions, but in a negative way. In that state, the use of such controls to prohibit or restrict the installation or use of solar energy systems is forbidden in any instrument of sale or transfer or real property.<sup>99</sup>

Zoning, like easements, also has its advantages and disadvantages. An advantage is that zoning could be applicable to both new and existing developments.<sup>100</sup> However, zoning is easily subject to legislative change and to the granting of variances.<sup>101</sup> Thus, the achievement of solar access through zoning would not be as stable as that obtained through an easement, since there is no property interest in such a solar right. Nevertheless, the use of local zoning to improve solar access would grant homeowners the opportunity to receive sunlight where private easements could not be negotiated. Further, it is doubtful that a city would grant a variance or substantially modify an existing zoning law if a large number of people were already utilizing energy under it.<sup>102</sup>

Under the Ohio solar access law the owner of the benefited land may maintain an action in equity or at law for damages to prevent the obstruction of the solar easement.<sup>103</sup> No particular remedy, however, is specified in the statute. This may present a problem for the solar user who sues a neighbor for obstruction of an express easement. While it is clear that Ohio courts have enforced agreements on light and air between ad-

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<sup>96</sup> MINN. STAT. ANN. § 462.39 (West Supp. 1982).

<sup>97</sup> See Myers, *supra* note 18 at 322: "[H]omes of uniform height on level ground with rooftop collectors can be more closely and easily spaced than buildings of varying height or buildings on hilly ground." *Id.*

<sup>98</sup> MINN. STAT. ANN. § 462.358(2) (West Supp. 1982). This is a new twist in the law, since these same land-use controls can be an obstacle in solar access. See P. SPIVAK, *LAND-USE BARRIERS AND INCENTIVES TO THE USE OF SOLAR ENERGY* 1-8 (1979). See also Wiley, *Private Land Use Controls as Barriers to Solar Development: The Need for State Legislation*, 1 SOLAR L. REP. 281 (1979).

<sup>99</sup> CAL. CIV. CODE § 714 (West 1982).

<sup>100</sup> Comment, *Assuring Legal Access to Solar Energy: An Overview with Proposed Legislation for the State of Nebraska*, 12 CREIGHTON L. REV. 567, 622 (1978).

<sup>101</sup> See Comment, *supra* note 90, at 123.

<sup>102</sup> This is largely a matter of common sense. Once a city zones to encourage solar energy use, substantial modification of the law might be unpopular enough among local solar energy users to cost city officials the next election. Constitutional questions of taking may arise when variances are granted.

<sup>103</sup> OHIO REV. CODE ANN. § 5301.63 (Page 1981).

joining landowners,<sup>104</sup> the standard used in such a case was that of "serious impairment of light and air."<sup>105</sup> The issuing of an injunction is an extraordinary remedy, not employed lightly by the court.<sup>106</sup> As in a nuisance action, there is often a requirement that the party seeking the injunction suffer substantial harm.<sup>107</sup> In the solar access situation an injunction may be the *only* remedy which will be satisfactory, because once a collector is shaded its usefulness is diminished.<sup>108</sup> If landowner *A* has granted a solar access easement to landowner *B* and then builds a structural addition which blocks the collector, reducing its efficiency by two percent, a court may not find substantial impairment. However, *B*'s heating costs may rise by a substantial percentage. Additionally, if *A*'s addition is a lawful structure, under traditional police powers the owner of such structure cannot be ordered to remove it.<sup>109</sup> Therefore, *B*'s only recourse might be an award of monetary damages. Due to the difficulty of calculating *B*'s heating needs plus the increase in fuel costs and the permanent nature of the decreased usefulness of *B*'s collector, such monetary damages may not adequately compensate *B*. Since no case law has arisen under the Ohio Solar Access Easement Act, it is uncertain whether an Ohio court would award only money damages or whether it would grant an injunction without a showing of serious impairment. The Act as written does not clearly point to either outcome.

While the Ohio Solar Access Easement Act does not grant an absolute right to solar access,<sup>110</sup> New Mexico has created such a right under its Solar Rights Acts.<sup>111</sup> The New Mexico statute bases the existence of a right to solar access on the prior appropriation doctrine. This doctrine, most often used in the area of water rights,<sup>112</sup> is founded on the legal principle of "first in time is first in right."<sup>113</sup> It allows the first person who puts a solar collector to beneficial use to appropriate the space needed to ensure solar access.<sup>114</sup> In some ways the concept is also similar

<sup>104</sup> *Haas v. Strauss*, 34 Ohio Cir. Dec. 377, 23 Ohio C.C. (n.s.) 547 (8th Dist. 1912) (Cuyahoga County) (agreement enforced by injunction).

<sup>105</sup> *Id.* at 380, 23 Ohio C.C. (n.s.) at 550.

<sup>106</sup> *American Snuff Co. v. Walker*, 175 Ky. 149, 193 S.W. 1021 (1917).

<sup>107</sup> W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 596 (4th ed. 1971).

<sup>108</sup> California has passed a Solar Shade Control Act, CAL. PUB. RES. CODE §§ 25980-86 (West Supp. 1981), which prohibits planting a tree or shrub so as to cast a shadow greater than 10% of the collector absorption area on the solar collector surface at any one time between the hours of 10 a.m. and 2 p.m. local standard time.

<sup>109</sup> G. HAYES, *SOLAR ACCESS LAW* 23 (1979).

<sup>110</sup> OHIO REV. CODE ANN. § 5301.63 (Page 1981).

<sup>111</sup> N.M. STAT. ANN. §§ 47-3-1 to 3-5 (1978).

<sup>112</sup> Comment, *supra* note 93, at 170.

<sup>113</sup> See S. KRAEMER, *supra* note 12, at 152. Compare this doctrine with the riparian rights doctrine, in which riparian owners are considered to have equal rights to the use of water.

<sup>114</sup> Comment, *supra* note 93, at 170. The beneficial use signifies the vesting of the solar access rights.

to the doctrine of ancient lights, although under the latter doctrine a long prescriptive period of time is needed in order to secure an access right. It is not surprising that Ohio has not adopted such a policy in view of its rejection of ancient lights.<sup>116</sup> In some respects the New Mexico approach has the same uncertainty attendant to the Ohio statute: what property rights does each solar user have in regard to land owned?

There are problems associated with the granting of an absolute solar right. It seems to be virtually unlimited once granted, and thus neighboring landowners would not be able to develop property in any way which would impair the collector's path to the sun.<sup>116</sup> Conceivably, this could mean that a collector built by one person could be used to prevent the construction of one by a second person, since the latter collector, to be efficient, might have to be built so as to impair the first neighbor's access. Constitutional questions of taking without compensation have also been raised regarding this Act.<sup>117</sup> Wyoming has recently enacted a statute similar to New Mexico's, and some of the same constitutional questions have been raised.<sup>118</sup>

The omission from the Ohio Solar Access Easement Act of a right to access to sunlight based on prior appropriation is not a harmful flaw. In fact, some commentators have questioned whether application of prior appropriation water principles is apposite to the solar access area since that doctrine developed in the Western states, as a response to resource-scarcity, a condition not pertinent to sunlight.<sup>119</sup>

An act which would grant a right to access to sunlight should not be considered an impossibility in Ohio. Many countries have successfully granted an access right without great legal difficulty.<sup>120</sup> In Japan, for example, the right to sunshine is given effect in the judicial doctrine of *Nissho-Ken*.<sup>121</sup> The present access right stems from the 1946 constitutional guarantee of a wholesome life.<sup>122</sup> Based on energy demands and the need for alternative energy sources to maintain an acceptable standard of living, a limited right to access to sunlight would be justified under a state's general welfare provision, similar to Japan's wholesome life provision.<sup>123</sup>

Commentators have recently suggested that states could legislate solar

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<sup>116</sup> *Hieatt v. Morris*, 10 Ohio St. 523 (1860).

<sup>116</sup> Comment, *supra* note 93, at 171.

<sup>117</sup> See S. KRAEMER, *supra* note 12, at 27 (Supp. 1983).

<sup>118</sup> *Id.* See also WYO. STAT. §§ 34-22-101 to 106 (Supp. 1982).

<sup>119</sup> See Note, *supra* note 20, at 455 (1980); Comment, *The Legislative Response to Solar Access: A Lesson for Michigan?*, 1979 DET. C.L. REV. 261, 266 (1979).

<sup>120</sup> Japan, Great Britain, and France are examples of countries which recognize a right to light. See Seeley, *supra* note 12, at 687-720; Note, *The Right to Light: A Comparative Approach to Solar Access*, 4 BROOKLYN J. INT'L L. 221 (1978).

<sup>121</sup> Seeley, *supra* note 12, at 711.

<sup>122</sup> *Id.* at 710 n.139.

<sup>123</sup> OHIO CONST. preamble.

access through the use of transferable development rights.<sup>124</sup> Under this scheme, ownership of land is divided into two parts—ownership of the physical land and ownership of the development potential of that same land.<sup>125</sup> The primary purpose of this division is to compensate landowners whose property has been devalued through regulations placing restrictions on the permissible types of development.<sup>126</sup> Through the use of TDR's, property owners burdened by development limitations could be compensated by transferring their development rights to another landowner whose property was not so burdened.<sup>127</sup> In the solar access area it would work as follows:

The TDR concept can be applied to solar access problems through the creation of a transferable solar right (TSR). To initiate this system, the local zoning board would specify a base level of insolation to which a landowner would be entitled. Certain areas, such as residential neighborhoods, would then be zoned for a greater amount of sunlight, while others, such as commercial or industrial districts, would be zoned for a smaller amount. An owner who wished to construct a building in one of the latter areas that would obstruct more than the base level of insolation would be required to purchase enough TSR's from owners in residential areas to cover the amount of obstruction above the base level. Thus the residential owner would be compensated for the loss of the potential to obstruct sunlight.<sup>128</sup>

The potential success of the TSR concept is doubtful since the constitutionality of such a land-use scheme is still being debated.<sup>129</sup> In addition, the TSR concept may be unnecessary in residential areas since ensuring solar access would normally create only a nominal taking not requiring compensation in the form of a transfer right.<sup>130</sup> The exclusion of a provision on transferable development rights, like the lack of a solar right provision, does not alone render the Ohio law insufficient. The complexities and uncertainties of such an approach warrant continued study.

The area in which Ohio law is complete is that of taxes,<sup>131</sup> giving atten-

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<sup>124</sup> S. KRAEMER, *supra* note 12, at 159-65; A. MILLER, G. HAYES & G. THOMPSON, SOLAR ACCESS AND LAND USE: STATE OF THE LAW 1977 9-10 (1977); Note, *A Legislative Approach to Solar Access: Transferable Development Rights*, 13 NEW ENG. L. REV. 835 (1978); Comment, *supra* note 90, at 127.

<sup>125</sup> Comment, *supra* note 90, at 127.

<sup>126</sup> See Hayes, *supra* note 109, at 207.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 127-28 (footnote omitted).

<sup>129</sup> See S. KRAEMER, *supra* note 12, at 161-65.

<sup>130</sup> *Id.* at 165.

<sup>131</sup> This may be because the legislature is well-accustomed to using its taxing powers, as opposed to creating legislation centering on alternative energy resources.

tion to property, franchise, sales and use, and income taxes.<sup>132</sup> Not all states have such an elaborate system of tax incentives for the solar user.<sup>133</sup> Some states, however, as well as the federal government, have gone further than Ohio in instituting loan and grant programs for those using solar energy.<sup>134</sup> Some loan programs, such as ones operating in Minnesota, Iowa, and Tennessee, have been aimed at low- and moderate-income families.<sup>135</sup> Others have been designed to encourage alternate energy sources at all income levels.<sup>136</sup> The federal government offers a grant program for solar energy devices through the Department of Housing and Urban Development.<sup>137</sup> The institution of a low-interest loan program in Ohio would do much to encourage the purchase of solar collection devices.

Another area which the Ohio Act covers adequately is the prevention of hindrance of the services of Ohio solar energy users by public utilities.<sup>138</sup> It is likely that the use of solar energy devices could be perceived as a threat to the well-being of public utilities since the devices decrease the amount of electricity or gas a home might otherwise require.<sup>139</sup>

In sum, the Act is only a beginning toward a comprehensive solar access scheme. One commentator has suggested that a good solar access law should do the following:

1. Maximize protection from shadows during the hours of high insolation to reasonably located active-type collectors for new structures.
2. Maximize protection of a similar nature to passive systems in new developments.
3. Maximize protection to property owners retrofitting their homes with cost-effective solar devices in established neighborhoods where the use is in accord with existing zoning and where due process has been given affected nearby landowners.
4. Deny protection in retrofitting cases where the burden that would be imposed on a complaining neighbor clearly outweighs the potential benefit to the owner of the solar building.
5. Have a built-in flexibility to adapt to the availability of

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<sup>132</sup> See *supra* text accompanying notes 61-71.

<sup>133</sup> See S. JOHNSON, A SURVEY OF STATE APPROACHES TO SOLAR ENERGY INCENTIVES 1-27 (1979); S. KRAEMER, *supra* note 12, at 36-47 (Supp. 1983) for state-by-state listings of solar tax incentives.

<sup>134</sup> See S. JOHNSON, *supra* note 133, at 29-33.

<sup>135</sup> IOWA CODE ANN. § 220.1-.12 (West Supp. 1981); MINN. STAT. ANN. § 462A.05 (14-15) (West Supp. 1982); TENN. CODE ANN. § 13-23-116 (1982).

<sup>136</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 50680 (West 1979).

<sup>137</sup> 42 U.S.C. § 8231 (1982).

<sup>138</sup> OHIO REV. CODE ANN. § 4933.32 (Page 1981).

<sup>139</sup> Schiflett & Zuckerman, *Solar Heating and Cooling: State and Municipal Legal Impediments and Incentives*, 18 NAT. RESOURCES J. 313, 330-31 (1978); Comment, *supra* note 4, at 1029.

new technologies.

6. Minimize the administrative expense to the structure's developer, builder, and owner, and to the enforcing jurisdiction.

7. Minimize delay.

8. Arbitrate differences between neighboring landowners to reduce the likelihood of litigation between neighbors.

9. Allow private, alternative agreements among adjacent property owners.

10. Be politically acceptable.

11. Provide for all types of property zones.

12. Include standards for zoning boards telling them when variances or special uses should be allowed.<sup>140</sup>

Ohio law does not meet the suggested standards. It deals with only two areas of access to sunlight—express agreements and taxes. The ability of the legislature to devise a more inclusive solar scheme will, in large part, determine the effectiveness of solar energy as an alternative energy source. Suggestions to improve Ohio law include the addition of an explicit purpose and a more clearly identified remedy for obstruction. In addition, the law must go beyond the mere right to grant an easement. Development of enabling legislation to utilize zoning and the creation of a loan program is desirable. Furthermore, the idea of granting a right to light should be explored more fully as energy conditions change in the future.

Other programs need to be initiated to encourage the use of solar energy. A major problem which some energy users might face is resistance to the use of collectors based on aesthetic concerns.<sup>141</sup> Another difficulty is the lack of awareness of the sun as an alternate energy source. These problems need to be resolved *now* in order that the use of solar energy not be further impeded.

## V. PROPOSED SOLAR ACCESS LEGISLATION FOR OHIO

Evaluation of the current Solar Access Easement Act of Ohio reveals that the legislation is inadequate in protecting the needs of potential users of solar energy.<sup>142</sup> Passage of a comprehensive solar access act would assure adequate access to sunlight. The following is a proposed Ohio Solar Access Act. Because easements are an important part of a comprehensive act, that part of the current Act on easements which is appropriate shall be incorporated in the proposed act.<sup>143</sup> The code sections on taxes,

<sup>140</sup> See A. MILLER, G. HAYES & G. THOMPSON, *supra* note 124, at 14.

<sup>141</sup> See Shiflett & Zuckerman, *supra* note 139, at 335; Spiecker, *Report From West Germany: Are Solar Collectors Too Ugly For Bavaria?*, 1 SOLAR L. REP. 571 (1980).

<sup>142</sup> See *supra* notes 82-141.

<sup>143</sup> The Ohio Access Easement Act is codified at OHIO REV. CODE ANN. § 5301.63 (Page 1981).

which will not be reproduced in the proposed act, are important as related provisions of any solar access act and the proposed act following should be read as if to encompass them.<sup>144</sup>

### PROPOSED SOLAR ACCESS EASEMENT ACT

#### SOLAR ACCESS; EASEMENTS; ENABLING LEGISLATION; REMEDIES

*The legislature of Ohio hereby finds and declares that the use of solar energy in Ohio will help reduce this state's reliance on nonrenewable energy sources, benefit the environment, and promote the general welfare, health, and safety of the people of this state; and henceforth its use shall be encouraged.*

*As a means of facilitating solar access and with realization of the dangers of increased shading of solar energy systems as their use grows the following provisions are hereby enacted.*<sup>145</sup>

##### (A) Easements

*For the purpose of ensuring adequate access to sunlight for a solar energy system<sup>146</sup> any person may grant a written solar access easement which shall be subject to the same reconveyance and recording requirements as other easements.*<sup>147</sup>

*Any instrument that grants a solar access easement shall include:*

- (1) A description of the real property burdened and benefited by the solar access easement;*
- (2) A description of the limits in heights, locations, or both, of permissible development on the burdened land in terms of structures, vegetation, or both, for the purpose of providing solar access for the benefited land;*
- (3) Any terms or conditions under which the solar access easement is granted or may be terminated;*
- (4) A term stating that the solar easement runs with the land, unless terminated in accordance with the terms of the easement regarding termination, or unless otherwise agreed by the parties;*
- (5) Any other provisions necessary or desirable to execute the instrument.*<sup>148</sup>

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<sup>144</sup> The Ohio tax provisions relating to solar access are found in the following code sections: OHIO REV. CODE ANN. §§ 4933.31, 4933.32, 5709.53, 5733.062, 5739.02(B)(13), 5739.02(B)(26), and 5747.053 (Page 1981).

<sup>145</sup> Adapted from the proposed statute contained in W. THOMAS, A. MILLER & R. ROBBINS, *supra* note 95, at 37-38.

<sup>146</sup> Solar energy system is defined in OHIO REV. CODE ANN. § 1551.20(A) (Page 1982). See *supra* note 8 and accompanying text.

<sup>147</sup> Adapted from OHIO REV. CODE ANN. § 5301.63 (Page 1981).

<sup>148</sup> *Id.*

*The owner of the benefited land may prevent the obstruction of the solar easement by injunction or other proceedings in equity or at law and is entitled to reasonable attorneys' fees as fixed by the court.*<sup>149</sup>

**(B) Zoning**

*(1) For the purpose of ensuring adequate access to sunlight, the state, through its police power, hereby authorizes all local governmental units which have the authority to prepare, adopt, and enforce zoning and subdivision regulations based upon comprehensive land-use development plans and districts to include considerations assuring adequate access to sunlight in all applicable zoning regulations, ordinances, and comprehensive land-use plans. These considerations shall include height and location of vegetation in relation to property lines, design of structures in a subdivision and their location in relation to each other, the use of setback and height requirements, the use of restrictive covenants, and any other considerations deemed appropriate to ensure adequate access to sunlight.*<sup>150</sup>

*(2) Where application of any enacted zoning or land-use regulation would impede the use of a solar collector by impairing a solar user's ability to obtain adequate access to sunlight, all local governments are authorized to grant a variance to protect the access-to-sunlight right so long as such variance does not work as a detriment to the community as a whole.*<sup>151</sup>

**(C) Protection**

*The protection of an access-to-sunlight right shall be exercised with full awareness of the constitutional property right involved.*<sup>152</sup>

The proposed act stands as an improvement over the present Ohio Solar Access Easement Act in several ways. By including a general purpose, courts which must later interpret the act are apprised of a strong policy favoring access to sunlight.<sup>153</sup> The proposed provision on easements has been changed in two respects from the current Act. The first change is that the section's purpose has been enlarged to include access to sunlight for a "solar energy system" rather than just a "solar energy collector."

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<sup>149</sup> Adapted from OHIO REV. CODE ANN. § 5301.63 (Page 1981). This provision obviates the hesitancy courts may have in granting an injunction in this area.

<sup>150</sup> Adapted from a proposed model statute contained in Note, *supra* note 100, at 626.

<sup>151</sup> See Note, *supra* note 100, at 627.

<sup>152</sup> This section states the obvious. All legislation must operate in a constitutional manner.

<sup>153</sup> See Note, *supra* note 84, at 138-40.



The substitution of terms is intended to clarify the coverage of the Act, since "solar energy system" is defined in another section of the Ohio Revised Code<sup>154</sup> while "solar energy collector" is not. The second change is the inclusion of a specific remedy, injunctive relief. This addition should make it clear to the courts that monetary damages may not be sufficient to compensate adequately a solar user whose access to sunlight has been blocked and that injunction may be a proper remedy. Section B, on zoning, is included to promote a right of access to sunlight among a larger segment of the population than those persons with the specialized knowledge and motivation necessary to conclude a voluntary solar easement.<sup>155</sup> In addition, enabling legislation, lacking in the current Ohio Act, is included in the proposed act, in section B(2), allowing local governments, through the state police power, to zone the right to access to sunlight.<sup>156</sup> Zoning is a means by which solar energy use can be encouraged at a local level. Local authorities are more intimately involved in community affairs than are state authorities, and should be better equipped to zone access to sunlight. Section C, concerning protection, is made part of the comprehensive act to underscore the importance of questions of constitutional taking of property when a solar access right is granted. Such questions may arise when communities make use of zoning to grant an access-to-sunlight right.<sup>157</sup>

This proposed model statute is an attempt to show how current access-to-sunlight legislation could be improved. It is not intended to be a final solution to access problems, and indeed there are other means by which the state could encourage the use of solar energy. One example would be the creation of a loan provision for solar users. The loan program would be an advantage in legislation for access to sunlight because it would reduce the initial cost of the system, decrease long-term financing costs, and benefit low- and moderate-income groups.<sup>158</sup> The novelty of the solar access question mandates continued legislative study by the state.

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<sup>154</sup> OHIO REV. CODE ANN. § 1511.20(A) (Page 1981).

<sup>155</sup> See Berryhill & Parcell, *Guaranteeing Solar Access in Virginia*, 13 U. RICH. L. REV. 423, 453 (1979); see Franta, *Drafting a Simple Solar Easement*, 2 SOLAR L. REP. 341, 343-46 (1980), for an example of a solar easement between two parties.

<sup>156</sup> See *supra* text accompanying notes 94-102.

<sup>157</sup> The power to zone is not unlimited, and therefore certain zoning plans may withstand constitutional attack better than others. Comprehensive plans which include considerations of solar access minimize the risk that such legislation may be declared unconstitutional. Under a comprehensive plan, it is more likely that similarly situated landowners will be treated equally. See P. SPIVAK, *LAND-USE BARRIERS AND INCENTIVES TO THE USE OF SOLAR ENERGY* 17 (1979).

<sup>158</sup> See S. JOHNSON, *supra* note 133, at 29.

## VI. THE POSSIBILITIES FOR OHIO CASE LAW SINCE PASSAGE OF THE OHIO SOLAR EASEMENT ACT

Ohio should be moving in the direction of enacting a comprehensive solar access act to ensure adequate access to sunlight. Even under the current solar access law, however, Ohio courts could reexamine the issue of access to sunlight. To date, no Ohio court has had the opportunity to do so because since the passage of the Ohio Solar Easement Act there has been no litigation under its provisions.<sup>159</sup> Because access to sunlight under the Act is a means of obtaining energy and not merely illumination, the policy considerations of the Ohio courts may be different from those expressed in the early Ohio cases on access to sunlight.<sup>160</sup> This has certainly been the case in some states which have recently heard access-to-sunlight cases.<sup>161</sup>

One of the most recent and innovative decisions in the access-to-sunlight area was reached by the Supreme Court of Wisconsin in *Prah v. Maretti*.<sup>162</sup> Prah, the owner of a solar-heated house constructed in 1978-79, brought an action seeking damages and to enjoin the construction of a residence by defendant Maretti on the lot adjacent to and south of his lot. Prah contended that the proposed residence, although in conformity with existing deed restrictions and local ordinances, would adversely affect the integrity of his solar system by interfering with his access to an unobstructed path of sunlight. Although the plaintiff relied upon three legal theories as the basis for relief, the one accepted by the court was the common-law private nuisance theory.<sup>163</sup> In so doing, the court cited support for its position that access to light could be protected by the use of common-law private nuisance under the "modern American rule invalidating spite fences."<sup>164</sup> The court held that its reluctance in the late nineteenth century and early twentieth century to provide broader protection

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<sup>159</sup> There may be a number of reasons why no case law exists under the Act. One may be that solar energy has not yet been employed by a large number of people in the state. This may be in part a result of the state's inaction in encouraging and promoting solar use. Additionally, the Ohio Act as written has a narrow focus. The only persons bringing an action under the Act would be those trying to enforce a private easement of access to sunlight. Those individuals whose neighbor(s) refuse to grant an easement are not afforded any recourse under the Act.

<sup>160</sup> See *supra* text accompanying notes 21-53.

<sup>161</sup> See, e.g., *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982). The case is discussed *infra* text accompanying notes 162-68.

<sup>162</sup> *Id.*

<sup>163</sup> In addition to private nuisance, the plaintiff relied on a Wisconsin statute allowing actions for physical injury to real property and on the doctrine of prior appropriation. *Id.* at 229-30, 321 N.W.2d at 186.

<sup>164</sup> The court cited an Idaho case, *Sundowner, Inc. v. King*, 95 Idaho 367, 509 P.2d 785 (1973), in which spite fences were prohibited. In Ohio, *Letts v. Kessler*, 54 Ohio St. 73, 42 N.W. 765 (1896), is still valid precedent; hence spite fences are still not actionable under a common-law theory of private nuisance.

for landowner's access to sunlight was based on consideration of three policy objectives:

First, the right of the landowners to use their property as they wished, as long as they did not cause physical damage to a neighbor, was jealously guarded . . . . Second, sunlight was valued only for aesthetic enjoyment or as illumination. Since artificial light could be used for illumination, loss of sunlight was at most a personal annoyance which was given little, if any, weight by society . . . . Third, society had a significant interest in not restricting or impeding land development.<sup>165</sup>

Not surprisingly, the court held further that these policies reflect "factual circumstances and social priorities which are now obsolete."<sup>166</sup> The court took judicial notice of the fact that the use of land has been increasingly regulated for the general welfare.<sup>167</sup> It held that access to sunlight is no longer grounded on aesthetic reasons or the need for illumination but on its use as an alternate energy source.<sup>168</sup> Finally, the court reasoned that "the policy of favoring unhindered private development in an expanding economy is no longer in harmony with the realities of our society."<sup>169</sup> As a result of these conclusions, the court held that a plaintiff had established a claim under which relief could be granted and remanded the case for further consideration. The Wisconsin court's willingness to reassess access to sunlight could serve as a model for Ohio.

Ohio originally rejected an implied easement of light and the doctrine of ancient lights on the ground that each was "unsuited to a country like ours."<sup>170</sup> This is similar to one of the original reasons advanced by the Wisconsin court in rejecting the doctrine of ancient lights—society's interest in not restricting or impeding land development.<sup>171</sup> This rationale seems outdated, as land use control through zoning has been recognized as constitutional,<sup>172</sup> and air rights above one's home are subject to reasonable use by aircraft.<sup>173</sup> The old legal maxim, *cujus est solum, ejus est*

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<sup>165</sup> 108 Wis. 2d at 235, 321 N.W.2d at 189. The third policy objective is the one cited by the Ohio Supreme Court in *Mullen v. Stricker*, 19 Ohio St. 135, 144 (1869), discussed *supra* text accompanying notes 22-24.

<sup>166</sup> 108 Wis. 2d at 236, 321 N.W.2d at 189.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* Wisconsin has recently passed solar legislation which grants tax benefits and enables local governments to pass ordinances to guarantee access to sunlight. See WIS. STAT. ANN. §§ 66.031-66.033 (West Supp. 1982) and WIS. STAT. ANN. § 70.111 (West Supp. 1982).

<sup>169</sup> 108 Wis. 2d at 237, 321 N.W.2d at 190.

<sup>170</sup> *Mullen v. Stricker*, 19 Ohio St. 135, 144 (1869).

<sup>171</sup> 108 Wis. 2d at 235, 321 N.W.2d at 189.

<sup>172</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>173</sup> Regulation of navigable airspace is within the sovereignty powers of the United States. Federal Aviation Act, 49 U.S.C. § 1348 (1976).

Some commentators do not find society's interest in unimpeded land development out-of-

*usque ad coelum* (whoever owns the soil owns also up to the sky and to the depths)<sup>174</sup> is no longer a truism. Land is subject to several land-use controls, not only above the land, but on the soil itself. Setback and building-height requirements are just one example. Conservation as opposed to consumption has become the watchword for land use over the last few decades. Hence, refusal to recognize a right to sunlight should no longer rest on the ground that as a growing country we should not restrict land use. The grant of a right to access to sunlight would be no more an impediment to land use than a building-height restriction.<sup>175</sup>

In part, the Wisconsin court was able to base its acceptance of the common-law private nuisance theory in *Prah* on the existing case law regarding spite fences.<sup>176</sup> However, Ohio has not adopted the modern American rule. The 1896 case of *Letts v. Kessler*,<sup>177</sup> which has never been overruled, stands counter to modern judicial disapproval of spite fences. The court there reasoned there that where there was no recognized legal right of access to sunlight, there could be no liability on the part of the builder of the spite fence.<sup>178</sup> A legal maxim upon which the *Letts* court could have grounded its decision and reached a different result—*sic utere tuo, ut alienum non laedas*<sup>179</sup> (use your own so as not to injure another's property)—was not adopted by the court. The court's rejection of this doctrine flowed from the same reason that spite fences were not ordered removed: when no legal right existed, there could be no legal injury.<sup>180</sup> The decision in *Letts* distinguished obstruction of access to sunlight from other annoyances which might be nuisances, such as smoke and noise.

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date. See Williams, *Solar Access and Property Rights: A Maverick Analysis*, 11 CONN. L. REV. 430 (1979):

It is fashionable to dismiss such values as deriving from a bygone era in which people valued development as a "goal in itself," but current market prices for real estate, and more particularly the premiums paid for land whose zoning permits intensive use, suggests that people still place very high values on such rights.

*Id.* at 443. Cf. Goble, *Solar Access and Property Rights: Reply to a "Maverick" Analysis*, 12 CONN. L. REV. 270 (1980).

<sup>174</sup> 2 W. BLACKSTONE, COMMENTARIES 18 (Lewis ed. 1898).

<sup>175</sup> There is, however, a difference between implying an access-to-sunlight right and passing an ordinance regulating building height. That difference may be expressed in terms of "certainty." A landowner who buys in an area with fixed regulations concerning building height knows with certainty how tall a structure may be built from the time the land is purchased. On the other hand, a person who is next door to a homeowner who is granted a right to solar access and who as a result may not build an addition onto a home is not aware until after the granting of the right to his neighbor how much his or her property rights will be impinged on.

<sup>176</sup> 108 Wis. 2d at 235, 321 N.W.2d at 189.

<sup>177</sup> 54 Ohio St. 73, 42 N.E. 765 (1896).

<sup>178</sup> *Id.* at 85, 42 N.E. at 767.

<sup>179</sup> *Crino v. City of Campbell*, 68 Ohio App. 391, 395, 41 N.E.2d 583, 585 (1941) (Mahoning County).

<sup>180</sup> 54 Ohio St. at 85, 42 N.E. at 767.

The court reasoned in the case of smoke or noise that something is produced on one neighbor's land and conveyed to the adjoining owner, whereas when access to sunlight is obstructed something is merely withheld.<sup>181</sup> In the case of an obstruction of a solar collector, however, it could be argued that something is conveyed from one neighbor's land to the next—a shadow.<sup>182</sup> This alone could persuade an Ohio court to allow an access-to-sunlight case based on a common-law private nuisance theory. However, nuisance theory requires the balancing of the utility of the defendant's conduct against the seriousness of the harm.<sup>183</sup> In an access-to-sunlight case the harm would be the obstruction of the solar collector. If the defendant's conduct had utility it might or might not outweigh the harm to plaintiff, but plaintiff would at least have a chance of prevailing.<sup>184</sup> If the conduct was motivated by malice alone, the harm would probably outweigh the utility of the defendant's conduct only in jurisdictions where spite fences have been found to be actionable. Hence, the overruling of Ohio's spite-fence cases would be imperative if a plaintiff were to prevail in an access-to-sunlight case where access was obstructed on the basis of malice.<sup>185</sup>

In determining the justification for departing from precedent, Ohio courts can find guidance in the words of the Michigan court in *Burke v. Smith*,<sup>186</sup> a case cited in Ohio in *Peck v. Bowman*<sup>187</sup> (decided contra to *Letts*):

The right to breathe the air, and enjoy the sunshine, is a natural one; and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice towards his neighbors.<sup>188</sup>

It is manifest that the right to access to sunlight is even more compelling in the solar energy setting than in the case of illumination. Ohio courts should consider these differences if a case arises, so as to allow an action based on private nuisance in the access-to-sunlight area.

Nuisance law, however, is only of limited utility. While it provides for

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<sup>181</sup> *Id.* at 82, 42 N.E. at 766-67.

<sup>182</sup> See Note, *supra* note 100, at 591.

<sup>183</sup> See W. PROSSER, *supra* note 107, at 580-81.

<sup>184</sup> The problem exists that a court may find the use of a solar collector hypersensitive or abnormal. Under nuisance law, a plaintiff cannot by his or her own unusually sensitive use of property make the conduct of the defendant a nuisance. See Note, *supra* note 20, at 448.

<sup>185</sup> While this category of cases—those in which obstruction of access to sunlight is motivated by malice alone—may be a narrow one, the importance of recognizing a right to solar access would seem to suggest that anything which could be done to facilitate the access right should be done. Invalidating spite fences is one of the actions which should be taken.

<sup>186</sup> 69 Mich. 380, 32 N.W. 838 (1888).

<sup>187</sup> 10 Ohio Dec. Reprint 567 (C.P. Cuyahoga County 1889).

<sup>188</sup> 69 Mich. at 389, 37 N.W. at 842.

flexibility in determining the respective rights of adjoining property owners,<sup>189</sup> it is an uncertain remedy in at least two respects. First, during the construction stage it is difficult to determine whether a nuisance action could successfully protect a collector should an obstruction later develop.<sup>190</sup> Second, nuisance law does not afford the uniformity of a legislative access-to-sunlight right. Until adjudicated, the relative rights of adjoining-property owners in a nuisance action are unknown. The solar-collector owner who succeeds in a nuisance action suddenly owns a right not previously subject to recording requirements. This is contrary to the notion that property is based on a system of notice and recording so that the exact nature of the property owned is known. Nevertheless, the availability of a private nuisance action for solar-collector owners would be at least one way of giving owners the possibility of an access-to-sunlight right.

Another reason the Ohio court should reconsider its position on access to sunlight is the third rationale of the Wisconsin court in *Prah v. Maretti*.<sup>191</sup> Sunlight as an alternate energy source requires much different considerations than sunlight for aesthetic or illumination purposes.<sup>192</sup> These considerations are based on policy and the physical nature of the access required. Sunlight which is collected to supply energy must be direct sunlight.<sup>193</sup> Illumination does not require the flow of sunlight be direct; more diffuse or indirect sunlight will suffice to light a room. As a matter of policy the development and use of renewable energy sources is a high priority.<sup>194</sup> In Ohio, the legislature has declared state energy-planning purposes which include the encouraged utilization of the state's indigenous energy sources and promotion of the development of renewable sources of energy.<sup>195</sup> One commentator has suggested that one of the more important reasons to address solar access is ethical in nature—Americans desire the expansion of solar energy over any other energy alternative.<sup>196</sup> Although it is desirable for the law to be stable, it is not required to be static. The court's ability to review rulings in light of technological advances is one of the ways in which law maintains its relevancy.<sup>197</sup>

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<sup>189</sup> See Comment, *supra* note 90, at 126.

<sup>190</sup> Nuisance law in the area of solar access is especially uncertain. The utility of a structure which blocks access to a collector may outweigh the seriousness of the obstruction. See *supra* note 186.

<sup>191</sup> 108 Wis. 2d at 223, 321 N.W.2d 182 (1982).

<sup>192</sup> *Id.* at 236, 321 N.W.2d at 189.

<sup>193</sup> See Comment, *supra* note 90, at 101.

<sup>194</sup> See Solar Heating and Cooling Demonstration Act of 1974, 42 U.S.C. §§ 5501-5517 (1974).

<sup>195</sup> OHIO REV. CODE ANN. § 1551.18 (Page 1982). The sun is an indigenous energy source. It is found everywhere in the state and could be utilized to the benefit of all Ohio citizens.

<sup>196</sup> See Note, *supra* note 20, at 445-46 n.42.

<sup>197</sup> See *Norway Plains Co. v. Boston & Maine R.R.*, 67 Mass. 263, 266-68 (1 Gray) (1854), for a well-reasoned opinion in light of the great technological advances of that

Some commentators have suggested that courts look to other sources of law in analyzing access-to-sunlight problems, such as law pertaining to other natural resources.<sup>198</sup> These suggestions have included analogizing the rights involving such resources as water, oil, and gas to the right to sunlight.<sup>199</sup> Since, in the modern context of access to sunlight, the sun is being utilized as a source of energy, such analogies seem reasonable. In Ohio, a prescriptive right to the use of water may be obtained in the nature of a servitude or easement.<sup>200</sup> Should the Ohio courts refer to this body of law, a prescriptive right to access to sunlight could be found. However, due to 1) the difficulty of acquiring a right by prescription, 2) the long time period during which the use must continue, and 3) the long-standing rejection of the ancient lights doctrine,<sup>201</sup> it is doubtful that Ohio would adopt such an approach. Specifically because the prescriptive period of use is long, the adoption of such a body of law in the access-to-sunlight area would make little practical difference in obtaining an access-to-sunlight right. Additionally, no common-law state recognizes a landowner's right to acquire an easement of light by prescription.<sup>202</sup>

Other problems exist in basing a right to access to sunlight on natural-resource law. The sun, unlike water, oil, and gas, is not location-specific; it is recoverable everywhere.<sup>203</sup> Because they are limited resources, disputes involving oil and gas center around questions of title and ownership as opposed to a concern with access.<sup>204</sup> Further, oil and gas law is inseparable from oil and gas taxation law and usually involves a complex system of lease agreements.<sup>205</sup>

A different source of law by which the Ohio courts could analyze access-to-sunlight cases is that concerning the reception of television waves.<sup>206</sup> The use of this analogy is not likely to generate support for a right to receive sunlight, however, since a court faced with a poor-reception claim is likely to find that just as there is no right to receive light

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day—railroads. (The court determined the liability of railroad carriers of goods through analogy to ships and wagons.)

<sup>198</sup> See, e.g., Comment, *The Allocation of Sunlight: Solar Rights and the Prior Appropriation Doctrine*, 47 U. COLO. L. REV. 421, 427-28 (1976). The author rejects oil and gas law as a valid source of analogous doctrine since those resources are scarce and sunlight is not. She prefers the prior-appropriation water analogy discussed *supra* text accompanying notes 111-19.

<sup>199</sup> *Id.* at 428.

<sup>200</sup> See, e.g., *City of Cleveland v. Standard Bag & Paper Co.*, 72 Ohio St. 324, 74 N.E. 206 (1905); *Buckingham v. Smith*, 10 Ohio 288 (1840).

<sup>201</sup> *Hieatt v. Morris*, 10 Ohio St. 523, 78 Am. Dec. 280 (1860).

<sup>202</sup> See Comment, *supra* note 90, at 112.

<sup>203</sup> See Myers, *supra* note 18, at 330.

<sup>204</sup> See Comment, *supra* note 199, at 428-90.

<sup>205</sup> *Id.*

<sup>206</sup> *Eisenstadt & Utton, Solar Rights and Their Effect on Solar Heating and Cooling*, 16 NAT. RESOURCES J. 363, 368 (1976).

over the property of another, there is no right to receive television waves over the property of another.<sup>207</sup> In other words, the access-to-light cases, having come before the television-wave cases, were used by analogy in arriving at the resolution of the poor reception cases in the first place. Thus, the television-wave cases seem unfruitful sources of support for a right to solar access.

Ohio courts could revive the doctrine of ancient lights, a part of the common law. Of all the alternatives this one seems least likely to be adopted since the doctrine has been unanimously repudiated in the United States.<sup>208</sup> It also presents the same problems discussed in relation to a finding of a prescriptive right to access to sunlight by the use of analogy to the riparian rights doctrine.<sup>209</sup>

Should the Ohio courts refuse to reconsider the law as it relates to access to sunlight on the basis of private nuisance, natural resource, and radio and television law, and instead retain its reliance on actual access-to-sunlight cases, precedent exists in Ohio case law which does grant an implied easement of light and air.<sup>210</sup> This precedent arises from the so-called "street cases" discussed earlier. However, because the grant of the easement is limited to a narrow class—owners of property abutting a street—and because of the justification advanced for it, its application to access-to-sunlight cases is unlikely. It is hard to imagine that the use of solar energy would be found to be essential to the existence of the users, as required by the decisional law of the "street cases."<sup>211</sup>

In the end, perhaps the only practical alternative is that adopted by the Wisconsin court. First, the Ohio courts must reassess the policies behind the access-to-sunlight cases.<sup>212</sup> Most of these cases were decided a century ago. In assessing the reasons for recognizing a solar access right today the court should review a number of factors. Technological changes which have enabled the sun's rays to be utilized as a source of energy rather than illumination should be weighed in favor of the granting of a solar access right. The increased utilization of land-use regulation should

<sup>207</sup> See, e.g., *People ex rel. Hoogasian v. Sears Roebuck & Co.*, 52 Ill. 2d 301, 287 N.E.2d 677, cert. denied, 409 U.S. 1001 (1972). It was alleged that the building of the Sears Tower would interfere with the reception of over 100,000 television sets by the casting of its shadow. The court found that just as there was no right to light passing over the property of another, there was no right to receive television signals. *Id.* at 304-05, 287 N.E.2d at 678-79.

<sup>208</sup> See *Eisenstadt v. Utton*, *supra* note 206, at 368; *Moskowitz*, *supra* note 11, at 189 n.59. Louisiana is an exception.

<sup>209</sup> See *supra* notes 199-201.

<sup>210</sup> *Village of Port Clinton v. Fall*, 99 Ohio St. 153, 124 N.E. 189 (1919); *Cohen v. City of Cleveland*, 43 Ohio St. 190, 1 N.E. 589 (1885); *Lloyd Booth Co. v. Mahoning Co.*, 12 Ohio Cir. Dec. 706 (1898) (Mahoning County). For the other cases see *supra* note 45. *Cf. State ex rel. Schiederer v. Preston*, 170 Ohio St. 542, 166 N.E.2d 748 (1960); *Offutt v. John Roth Packing Co.*, 11 Ohio C.C. (n.s.) 357 (1908) (Hamilton County).

<sup>211</sup> See Comment, *supra* note 90, at 115.

<sup>212</sup> See *supra* notes 21-53.



be considered against the earlier judicial reluctance to perpetually encumber municipal development.<sup>213</sup> The availability and desirability of solar energy should be considered.

Second, the court must look to the statutory enactments to discover the legislative intent and policy considerations motivating the state regarding access to sunlight. Some support for the proposition that solar access is an important goal in Ohio may be obtained by looking to Ohio Revised Code section 1551.18 which sets forth the state's energy-planning purposes.<sup>214</sup> Since, under the Code, the development of alternate energy sources is encouraged, an access right would facilitate the realization of this purpose.

Finally, the outlook of the court must be broadened to include the decisions of other state courts and the activity of their legislatures in an effort to familiarize itself with the problems of denying solar access. The policy of the federal government in promoting access should be examined.<sup>215</sup>

The response of Ohio courts to access to sunlight is important if the use of solar energy is to become widespread. If the courts indicate a willingness to grant an access right in the proper situation, more potential users of solar energy may be encouraged to install collectors. While the number of people thus affected would probably be few in comparison to those who could be motivated by legislative enactment of an access right, the court's willingness to resolve disputes in favor of access would be significant in another way. It would reflect an official change in policy and perspective in this area, an area in which most relevant precedent is factually dissimilar. The possibilities for finding a solar access right today are many.

## VII. CONCLUSION

The widespread use of solar energy is not a futuristic dream. The sun is a renewable energy source which can be utilized today. As there is an increase in the number of solar energy users, the need for legal protection of access to sunlight also will increase. Access to sunlight is no longer

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<sup>213</sup> *Mullen v. Stricker*, 19 Ohio St. 135, 144 (1869).

<sup>214</sup> The energy purposes are as follows:

The general assembly finds and declares that it is an essential government function and public purpose of the state to promote the efficient utilization of energy, encourage the increased utilization of the state's indigenous energy resources, promote the development of renewable energy resources, and foster increased cooperation among all levels of government for the preservation or creation of jobs and employment opportunities, the encouragement of economic growth, the promotion of the general welfare, the protection of the public health and safety, and the protection of environmental quality.

OHIO REV. CODE ANN. § 1551.18 (Page 1982). The sun is an indigenous, renewable energy resource.

<sup>215</sup> See *supra* note 85.

centered on considerations of aesthetics, illumination, and view. With the advent of solar technology, it has been transformed into a right concerned with the utilization of energy. The response of legislators and courts to the differing legal problems which face the solar users of today, as opposed to those of yesteryear, will in large part determine progress in the use of the sun as a source of energy.

In view of the importance of solar energy, Ohio must move forward in its recognition of a right to access to sunlight. The current Ohio Solar Access Easement Act gives insufficient protection to potential users of solar energy. A more encompassing solar access law should be passed so that future generations need not contend with legal nightmares concerning access to sunlight.

Ohio courts must rethink their position on access to sunlight in view of the new concerns it presents. However, reliance on the courts solely to shape the access-to-sunlight area also is not satisfactory. Case-by-case determination of rights is a slow process in which the rights of individual parties alone are adjudicated. Ohio's inaction in this area will result in a schism between the factual reality of the need for access-to-sunlight right and the inability to protect access if it is initially obtained. It is in Ohio's best interest to legislatively promote solar use through ensuring access to sunlight. If Ohio does not act, the outlook for the future use of the sun as an energy source in the state is dismal. Ohio must take its cue from the federal government and other states which have begun to enact far-reaching legislation to develop and encourage solar use.

### Appendix

Solar energy can be utilized so long as the sun's rays strike the earth's surface. In Ohio solar energy use is more feasible in the summer months of June, July, and August. In July, Ohio's average daily radiation is as high as Miami, Florida's average daily radiation all-year-round. However, the sun may also be utilized as an energy resource during the other months of the year.

The following graph projects the average amount of daily radiation which hits Ohio's surface each month of the year. It is based on average radiation readings in seven Ohio cities: Akron, Cleveland, Columbus, Dayton, Put-In-Bay, Toledo and Youngstown. The graph demonstrates the practicality of utilizing the sun as an energy resource in Ohio.<sup>216</sup>

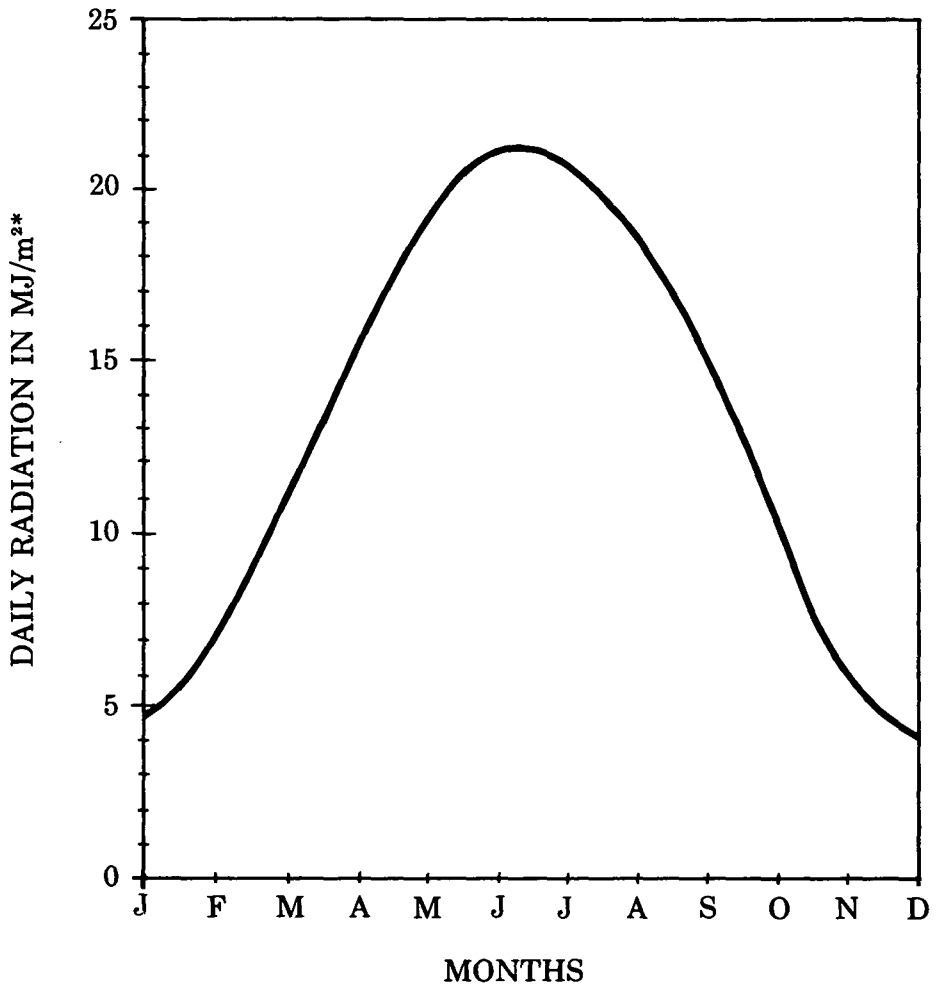
AMY E. BLENKHORN

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<sup>216</sup> Data on daily radiation from V. CINQUEMANI, J. OWENBY & R. BALDWIN, *INPUT DATA FOR SOLAR ENERGY SYSTEMS* (1978). (Report prepared for the U.S. Department of Energy by the National Oceanic and Atmospheric Administration.)

Graph prepared by M. Valco, B.S., M.S., Cleveland State University.

MONTHLY AVERAGE DAILY RADIATION ON A  
HORIZONTAL SURFACE FOR THE STATE OF OHIO



\*MJ/m<sup>2</sup> refers to Millions of Joules per square meter